80-775




No.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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CONCETTA CIAFFONI, ET AL.

PETITIONERS

v.

ELIZABETH COWDEN, ET AL.

RESPONDENTS

---

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE COMMONWEALTH
OF PENNSYLVANIA

---

# PETITION FOR WRIT OF CERTIORARI

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# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

CONCETTA CIAFFONI, ROBERT J. CIAFFONI AND MARGARET C. SOVIERO, PETITIONERS, PRAY THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGEMENT OF THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA ENTERED IN THE ABOVE-ENTITLED MATTER ON JUNE 16, 1980.

## QUESTIONS PRESENTED FOR REVIEW

1. SHOULD THE UNITED STATES SUPREME COURT GRANT CERTIORARI TO REVIEW THE OPINION OF THE HIGHEST STATE COURT OF PENNSYLVANIA WHICH IS IN CONFLICT WITH ITS OWN PRIOR OPINIONS DEALING WITH A SUBJECT MATTER OF GREAT PUBLIC INTEREST INVOLVING LEGAL PRINCIPALS OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE?

2. WAS THE INTEGRITY OF THE FACT

FINDING PROCESS OF THE TRIAL COURT SIGNIFICANTLY IMPAIRED BY ITS EXCLUSIONARY RULINGS CONTRARY TO THE EXISTING EVIDENTIARY LAWS OF PENNSYLVANIA SO AS TO DEPRIVE THE PETITIONERS OF DUE PROCESS AND A FAIR TRIAL?

3. WERE THE PETITIONERS DENIED DUE PROCESS WHEN THEY WERE ARBITRARILY AND ERRONEOUSLY PROHIBITED FROM PRESENTING RELEVANT AND COMPETENT EVIDENCE MATERIAL TO THE ISSUE OF FRAUD AS TO THE CONTESTED WILL?

## LIST OF ALL PARTIES TO PROCEEDINGS BELOW

THE WIDOW, CONCETTA CIAFFONI[+], 7 CHILDREN, AND 23 GRANDCHILDREN, IN ORDER OF BIRTH.[1.]

1. I. Orlando Ciaffoni, born 26 Feb 1917, father of:

    1. Paul A.
    2. Orlando J.
    3. William J.
    4. Annette M.*
    5. Joseph J.*

II. Margaret C. Soviero, mother of:

    1. Donna J.
    2. Anthony C.
    3. Suzette M.

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III. Robert J. Ciaffoni[+], father of:

1. Melody A.
2. Bonnie L.
3. Robert M.
4. David A.
5. Timothy A.
6. Sheryl L.*

IV. Pauline C. Myers, mother of:

1. Calvin H., Jr.
2. Alyssa A.
3. Susanne E.*

V. Lorrayne C. Erikson, mother of:

1. Lottie L.
2. Kim E.
3. Leif A.
4. Thor E.*

VI. Virginia C. Messa, mother of:

1. Joseph L., Jr.
2. Paul E.*

VII. Elizabeth C. Cowden[+], born 23 Jul 1940

[+]One of three named personal representatives on execution page 7 of the 10 May 1968 contested will.

*Under 18 years of age as of 10 Nov 1980.

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REFERENCE TO OFFICIAL REPORT

THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA RENDERED NO OPINION. IT AFFIRMED THE DECREE OF THE ORPHANS' COURT PER CURIAM ON APRIL 30, 1980 AT 417 A.2D 1136 (1980) WITH A VIGOROUS DISSENT FILED BY JUSTICE SAMUEL J. ROBERTS. APPLICATION FOR REARGUMENT WAS DENIED WITHOUT OPINION ON JUNE 16, 1980 WITH JUSTICE ROBERTS IN FAVOR OF GRANTING

REARGUMENT.

## STATEMENT OF GROUNDS

THE DECREE UPON WHICH THIS PETITION IS PREMISED WAS ENTERED ON APRIL 30, 1980 WITH REARGUMENT DENIED ON JUNE 16, 1980.

AN APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI HEREIN WAS PRESENTED TO JUSTICE WILLIAM J. BRENNAN, JR., WHO ON SEPTEMBER 12, 1980 SIGNED AN ORDER EXTENDING THE TIME HEREIN TO AND INCLUDING NOVEMBER 13, 1980.

## JURISDICTION

THAT A REVIEW ON A WRIT OF CERTIORARI IS SOUGHT HEREIN PURSUANT TO THE JUDICIAL DISCRETION OF THIS HONORABLE COURT UPON REASONS WHICH PETITIONERS AVER ARE SPECIAL AND IMPORTANT CONSIDERATIONS AND WHICH INVOLVE THE DENIAL OF PETITIONERS

RIGHTS TO DUE PROCESS OF LAW AS GUARANTEED BY AMENDMENT V AND XIV OF THE U.S. CONSTITUTION AND § 1 AND 11 OF THE PENNSYLVANIA CONSTITUTION.

AMENDMENT V PROVIDES IN PART: "NO PERSON SHALL...BE DEPRIVED OF... PROPERTY, WITHOUT DUE PROCESS OF LAW." AMENDMENT XIV PROVIDES IN PART: "NO STATE...SHALL DEPRIVE ANY PERSON OF... PROPERTY, WITHOUT DUE PROCESS OF LAW; OR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS."

SECTION 11 OF THE PENNSYLVANIA CONSTITUTION PROVIDES IN PART "... EVERY MAN FOR AN INJURY DONE HIM IN HIS LANDS, GOODS, PERSON OR REPUTATION SHALL HAVE REMEDY BY DUE COURSE OF LAW, AND RIGHT AND JUSTICE ADMINISTERED WITHOUT SALE, DENIAL OR DELAY."

JURISDICTION IS INVOKED UNDER 28

U.S.C.A. 144, § 1257 (3), AS A REQUEST FOR A REVIEW OF A FINAL DECREE OF THE HIGHEST COURT OF A STATE BY WRIT OF CERTIORARI IN THAT THIS PETITION CLAIMS A RIGHT UNDER THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF PENNSYLVANIA.

## STATEMENT OF THE CASE

ON SEPTEMBER 23, 1974 PAUL CIAFFONI A RESIDENT OF WASHINGTON COUNTY, PENNSYLVANIA DIED LEAVING HIS WIDOW CONCETTA, SEVEN (7) CHILDREN AND TWENTY-THREE (23) GRANDCHILDREN SURVIVING HIM. AT ISSUE IS THE VALIDITY OF A WILL DATED MAY 10, 1968 PURPORTED TO BE THAT OF PAUL CIAFFONI WHICH WAS PROBATED BY THE ORPHANS' COURT DIVISION OF THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA AND FOUND TO BE VALID.

BECAUSE THE SCRIVENER OF THE CON-

TESTED WILL WAS A JUDGE FROM 1970 TO 1977 ON THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, A PROBATE COURT WAS SPECIALLY CONSTITUTED TO HEAR THE OBJECTIONS TO THE CONTESTED WILL.

THE PRESIDENT JUDGE OF THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY WAS SPECIALLY APPOINTED MAY 1978 BY THE SUPREME COURT OF PENNSYLVANIA TO SIT AS PROBATE JUDGE. JUDGE EARL S. KEIM, NOW DECEASED, EMPANELED AN ADVISORY JURY TO HEAR THE EVIDENCE TO BE PRESENTED BY THE PARTIES.

THE DOCUMENT IN QUESTION, CONSISTING OF SEVEN (7) PAGES, WAS ALLEGEDLY COMPOSED BY ATTORNEY RICHARD DISALLE. IT WAS PURPORTEDLY TYPED BY HIS SECRETARY, FRANCES M. GRAY AND EXECUTED ON MAY 10, 1968 IN THE PRESENCE OF RICHARD DISALLE, HIS SECRETARY, FRANCES M. GRAY, AND PATRICIA L. MCFARLANE, AN EMPLOYEE

OF THE TESTATOR AND ASSISTANT TO ELIZABETH COWDEN. THE WILL WAS COVERED WITH A WHITE BACKER IMPRINTED WITH THE NAME AND ADDRESS OF RICHARD DISALLE AND WAS HELD TOGETHER BY THREE (3) EYELETS.

A COPY OF A FORERUNNER WILL, DATED NOVEMBER 29, 1967, ALSO WITH RICHARD DISALLE AND FRANCES GRAY AS SUBSCRIBING WITNESSES WAS PROFFERED BY THE PROPONENTS. IT WAS ALSO QUESTIONED BY THE CONTESTANTS. (R-650A TO R-654A)

"AN EARLIER WILL PREPARED BY ANOTHER ATTORNEY" DATED DECEMBER 22, 1965, REFLECTED DATA AND PLOT, BUT FAILED TO EXPLAIN THE INCONSISTENCIES IN WORD USE AND TYPING STYLE IN THE PAIR OF QUESTIONED CIAFFONI COMPANION WILLS. (R-639A TO R-646A) FURTHER, THE PROPONENTS FAILED TO MAKE THE EARLIER WILL A PART OF THE COURT

EXHIBITS. (R-634A)

FORTY-SOME WILLS (R-740A TO R-747A) ORIGINATING FROM THE OFFICE OF RICHARD DISALLE WERE ABSTRACTED FROM THE RECORDS OF THE OFFICE OF THE REGISTER OF WILLS OF WASHINGTON COUNTY. THESE WILLS WERE SCRUTINIZED BY THREE (3) EXPERTS WHO OBTAINED A PICTURE OF THE HABITS AND CUSTOMS OF WORD USE AND PREPARATION OF TYPEWRITTEN WILLS WITH KNOWN DISALLE-GRAY INPUT. (R-731A)

AFTER A REVIEW OF THE FORTY-SOME COMPARISON WILLS, ANDREW Q. MORTON OF THE DEPARTMENT OF COMPUTER SCIENCE, UNIVERSITY OF EDINBURGH, SCOTLAND, AUTHOR OF LITERARY DETECTION: HOW TO PROVE AUTHORSHIP AND FRAUD IN LITERATURE AND DOCUMENTS, (CHARLES SCRIBNER'S SONS, 1979), AND AN EXPERT IN THE HABITS OF COMPOSITION, DETERMINED THE HABITS ESTABLISHED BY THE

DiSalle-Gray combination. He was then able to ascertain that the habits of composition of the DiSalle-Gray Team were substantially absent from the disputed documents. He, therefore, concluded that the disputed will of May 10, 1968 and the companion Ciaffoni will of November 29, 1967 did not come from the same source as the comparison series of wills.

Jon A. Shank, Dean of the School of Communications of Robert Morris College, Pittsburgh, Pa. reviewed the same comparison wills and analyzed thirty-nine (39) elements of identifying typewriting style. He matched these thirty-nine (39) elements against the pair of disputed wills and concluded that the questioned wills did not conform to the typewriting style of the contemporary comparison wills.

An Associate Professor of Linguistics at the University of Pittsburgh, Robert A. Parslow, a member of the American Association of Applied Linguistics, reviewed the same forty-some DiSalle-Gray wills for recurrent phraseology. When matched against the disputed documents, he found that they contained excessive irregularities of style in comparison to the forty-some DiSalle-Gray wills and also concluded the disputed wills to have not been the result of the collaboration of Richard DiSalle and Frances M. Gray, his secretary.

When the trial judge sustained objection to the introduction of the forty-some DiSalle-Gray comparison wills (R-713a), he foreclosed to the petitioners the introduction of the testimony of Messers. Shank, Morton

AND PARSLOW WHOSE TESTIMONY AS TO THE DISPUTED DOCUMENTS WOULD HAVE GONE TO THE JURY FOR ITS CONSIDERATION. THE TRIAL JUDGE THEN WITHDREW THE CASE FROM THE ADVISORY JURY, DISMISSED THE APPEALS FROM PROBATE, AND ENTERED A DECREE IN FAVOR OF THE VALIDITY OF THE MAY 10, 1968 QUESTIONED WILL.

THE NECESSARY EXCEPTIONS TO THE UNFAVORABLE RULINGS WERE TAKEN BY THE FILING OF A PRAECIPE FOR ORDER RE EXCEPTIONS AT THE CONCLUSION OF THE HEARING CONSTITUTING THE WILL CONTEST (R-1022A) FILED ON SEPTEMBER 25, 1978 AND BY THE SUBSEQUENT FILING OF THE SPECIFIC EXCEPTIONS TO THE FACT FINDER'S RULINGS. (R-1024A TO R-1047A)

## ARGUMENT

THE FRAUD INHERENT IN THE PAIR OF QUESTIONED WILLS CAN BE ESTABLISHED BY THE DISALLE-GRAY WILL PREPARATION STYLE,

AS MANIFESTED IN THE FORTY-SOME COMPARISON WILLS. SEE A.S. OSBORN, QUESTIONED DOCUMENTS 397,597 & 601 (1929); W.C. MOORE, "THE QUESTIONED TYPEWRITTEN DOCUMENT", 43 MINNESOTA LAW REVIEW, 727 (1959). WHILE ANYONE MAY PLAY A PIANO, THE PERFORMER CAN BE RECOGNIZED BY HIS RENDITION (STYLE, TEMPO, HARMONIES, OR MELODIC TREATMENT) GIVEN TO THE STANDARD WORK; I.E., HE MAKES THE MUSIC HIS OWN. (R-718A TO R-731A) THE PETITIONERS CONTEND THAT THE DEVIATIONS FROM THE DISALLE-GRAY STYLE AND ACCOMPANYING CIRCUMSTANCES INDICATE A SUPPLANTED DISALLE COMPOSITION, A REPLACED GRAY TYPEWRITING, A DISALLE-COWDEN CONSPIRACY AND A SIMULTANEOUS FACILITATION FOR THE FRAUDULENT SUBSTITUTION OF PAGES OVER EXECUTION PAGE SEVEN. (R-58A TO R-66A, R-96A TO R-111A AND R-707A TO R-747A)

THE REASONS WHICH MERIT THE

ALLOWANCE OF THIS WRIT ARE GROUNDED IN THE TRIAL COURT'S FAILURE TO FULFILL ITS JUDICIAL FUNCTION AS A FACT FINDER, NOT WHETHER APPELLANTS AGREE OR DISAGREE ON THE FINAL OUTCOME. DEPRIVATION OF A FAIR TRIAL AND THE LACK OF DUE PROCESS ARE FOUND IN THE EXCLUSIONARY PROCESS UTILIZED BY THE LOWER COURT. THE PER CURIAM OPINION OF THE PENNSYLVANIA SUPREME COURT HAS NOT REPUDIATED ITS EARLIER CASE LAW ON POINT. IT DID NOTHING. IF ALLOWED TO STAND, THIS OPINION WILL FOREVER BE A STUMBLING BLOCK AS IT RELATES TO EVIDENTIARY LAW IN PENNSYLVANIA.

THE DECISIONS OF THE PENNSYLVANIA SUPREME COURT GOING BACK TO 1871 MILITATE AGAINST THE PER CURIAM OPINION AFFIRMING THE ORPHANS' COURT EXCLUSIONARY RULING AS TO THE PETITIONERS' PROBATIVE EVIDENCE GOING TO

THE ISSUE OF FRAUD. LAPPE V. GFELLER, 211 PA. 462 AT 471, 60 A. 1049 (1905). ONCE THE SPECTOR OF FRAUD IS RAISED, THE PENNSYLVANIA SUPREME COURT HAS RULED THAT "... EVERYTHING (EMPHASIS SUPPLIED) WHICH THREW LIGHT UPON THE RELATION BETWEEN THE PARTIES OUGHT TO HAVE BEEN ADMITTED AND GONE TO THE JURY." [QUOTING, BURKHOLDER V. PLANK, 69 PA. 225 AT 234 (1871)]

THE "PROBATIVE EVIDENCE" TO BE PRESENTED BY THE PETITIONERS TO COUNTER THE BURDEN OF PROOF OF THE PROPONENTS WAS REJECTED BY THE ORPHANS' COURT IN ITS CONFUSION BETWEEN THE APPLICATION OF TERMS "ADMISSIBILITY" AND "CREDIBILITY". ONCE THE "PROBATIVE EVIDENCE" OF THE PETITIONERS WAS "ADMITTED" FOR THE PURPOSE OF SHOWING A FRAUD, THEN THE FACT FINDER, I.E., THE JURY, WOULD HAVE BELIEVED OR DISBELIEVED THE

EVIDENCE. IF BELIEVED, THE JURY WOULD HAVE ACCEPTED ITS "CREDIBILITY".

THE "PROBATIVE EVIDENCE" WHICH WAS ERRONEOUSLY EXCLUDED CONSISTED OF:

1. FORTY-SOME PROBATED WILLS, EACH HAVING KNOWN DISALLE-GRAY INPUT.

2. EXPERT TESTIMONY AS TO THIRTY-NINE (39) ELEMENTS OF IDENTIFYING TYPE-WRITING STYLE APPARENT IN THE FORTY-SOME COMPARISON WILLS.

3. EXPERT TESTIMONY AS TO "HABITS OF COMPOSITION" OF RICHARD DISALLE AS FOUND IN THE FORTY-SOME COMPARISON WILLS.

4. EXPERT TESTIMONY AS TO EIGHT (8) FACTORS OF LINGUISTIC ANALYSIS IDENTIFIED IN THE COMPARISON WILLS.

5. DECLARATIONS OR STATEMENTS OF THE DECEDENT WHICH WERE INCONSISTENT WITH THE VALIDITY OF THE ALLEGED WILL.

6. CIRCUMSTANCES, ACTS AND DECLARA-

TIONS OF INTERESTED PARTIES BEARING ON THE VALIDITY AND GENUINENESS OF THE WILL.

ON THE PENNSYLVANIA SUPREME COURT'S HOLDING IN KANE'S ESTATE, 312 PA. 531, 168 A. 681 (1933) THE COMPARISON WILLS SUBMITTED BY PETITIONERS SHOULD HAVE BEEN ADMITTED. IN KANE'S ESTATE, THE PENNSYLVANIA SUPREME COURT WAS CONCERNED WITH THE DENIAL OF PROBATE OF A WILL ON THE GROUND OF FORGERY, BY THE SUBSTITUTION OF ONE (1) PAGE AND THE ALTERATION OF ANOTHER. ADMITTED IN EVIDENCE WITH THE APPROVAL OF THE PENNSYLVANIA SUPREME COURT, IN BEHALF OF THE CONTESTANTS, WAS THE MACHINE UPON WHICH THE WILL WAS TYPED, A LETTER TO TESTATRIX'S FRIEND ALLEGEDLY TYPED ON THE SAME MACHINE, EXPERT TESTIMONY THAT THE LETTER WAS TYPED ON THE SAME MACHINE AS THE QUESTIONED

WILL, A DEED SIGNED BY A MRS. PAGE, ONE OF THE SUBSCRIBING WITNESSES, AND EXPERT TESTIMONY THAT THE DEED WAS ALSO TYPED ON THE SAME MACHINE AS THE ALLEGED WILL.

OPINION EVIDENCE TO BE PRESENTED BY EXPERTS SHANK, MORTON AND PARSLOW IS SPECIFICALLY ADMISSIBLE BY THE PENNSYLVANIA SUPREME COURT DECISIONS AND LEGISLATION GOVERNING WILL CONTESTS AS SET FORTH BY THE PENNSYLVANIA SUPREME COURT IN YOUNG ESTATE, 347 PA. 457 AT 459, 32 A. 2D 901 AT 902 (1943):

> THE LAW GOVERNING CASES OF THIS CHARACTER IS SETTLED. BY THE ACT OF JUNE 6, 1913, P.L. 451, § 1, 28 PS 16, IT IS PROVIDED THAT "WHERE THERE IS A QUESTION AS TO ANY WRITING, THE OPINIONS OF THE FOLLOWING PERSONS SHALL BE DEEMED TO BE RELEVANT: (A) THE OPINION OF ANY PERSON ACQUAINTED WITH THE HANDWRITING OF THE SUPPOSED WRITER. (B) THE OPINION OF THOSE WHO HAVE

HAD SPECIAL STUDIES RELATING TO DOCUMENTS, HANDWRITING, AND ALTERATIONS THEREOF, WHO ARE HEREIN CALLED EXPERTS. SECTION 2 OF THE SAME ACT PROVIDES: "IT SHALL BE COMPETENT FOR EXPERTS IN GIVING THEIR TESTIMONY, UNDER THE PROVISIONS OF THIS ACT, TO MAKE COMPARISON OF DOCUMENTS AND COMPARISON OF DISPUTED HANDWRITING WITH ANY DOCUMENTS OR WRITING ADMITTED TO BE GENUINE, OR PROVEN TO THE SATISFACTION OF THE JUDGE TO BE GENUINE, AND THE EVIDENCE OF SUCH EXPERTS RESPECTING THE SAME SHALL BE SUBMITTED TO THE JURY AS EVIDENCE OF THE GENUINENESS OR OTHERWISE OF THE WRITING IN DISPUTE."

THE OPINION EVIDENCE OF THE EXPERTS DID NOT STAND ALONE. IT WAS SUPPORTED BY POSITIVE AND DIRECT CORROBORATIVE EVIDENCE AS CONTAINED IN THE FORTY-SOME COMPARISON WILLS. THE ERROR OF THE PENNSYLVANIA SUPREME COURT IN NOT VACATING THE DECREE OF THE ORPHANS' COURT AND REMANDING FOR A NEW PROBATE

HEARING IS CLEAR, CONVINCING AND A MANIFEST INJUSTICE TO THE PETITIONERS. SEE: 42 PA. C.S.A. § 6111, PA. JUDICIAL CODE. SUCH EVIDENCE HAS BEEN ADMISSIBLE IN PENNSYLVANIA SINCE 1812. M'CORKLE V. BINNS, 5 BINNEY 339, PA. (1812).

THE COMPARISON OF TYPEWRITING SAMPLES WHICH WAS THE SCOPE OF THE TESTIMONY OF DEAN SHANK HAS ALWAYS BEEN ACCEPTABLE PROOF IN WILL CONTEST CASES ACCORDING TO THE PENNSYLVANIA SUPREME COURT. IN FACT, LARE WILL, 352 PA. 323 AT 327, 42 A.2D 801 (1945) ALLOWED COMPARISON TYPEWRITING TO BE DONE AT TRIAL, IN OPEN COURT. THE SUPREME COURT IN LARE, 352 PA. AT 330, 42 A.2D AT 804, HELD THAT THE ORPHANS' COURT ERRED IN EXCLUDING THE EVIDENCE OF FORGERY FROM THE JURY:

> IT IS THE FUNCTION OF THE HEARING JUDGE TO DETERMINE WHETHER THERE

IS A SUBSTANTIAL DISPUTE UPON A MATERIAL MATTER OF FACT. HE IS NOT, HOWEVER, TO CONSTITUTE HIMSELF THE JURY. IF A SUBSTANTIAL DISPUTE DOES EXIST, EVEN THOUGH THE VERDICT MIGHT BE AT VARIANCE WITH THE OPINION OF THE JUDGE, THE ISSUE MUST BE GRANTED: [MAKING REFERENCE TO A GRANTING OF AN ISSUE DEVISAVIT VEL NON TO SUBMIT THE QUESTION OF FORGERY TO A JURY.]

THE ORPHANS' COURT REFUSED TO ALLOW THE PETITIONERS TO PRESENT EVIDENCE OF STATEMENTS MADE BY THE TESTATOR IN AUGUST 1974 THAT HE NEVER SIGNED ANY DOCUMENT CONTAINING CERTAIN PROVISIONS WHICH EXISTED IN THE QUESTIONED DOCUMENT DATED MAY 10, 1968. THE TESTATOR DIED ON SEPTEMBER 23, 1974, LESS THAN ONE (1) MONTH LATER.

IN LAPPE, SUPRA, THE SUPREME COURT REFUSED TO DESIGNATE AS ERROR THE ADMISSION INTO EVIDENCE OF ACTS AND DECLARATIONS OF THE DECEDENT WITHIN

THREE (3) TO FOUR (4) MONTHS PRIOR TO HIS DEATH. THE COURT STATED IN LAPPE, SUPRA, 211 PA. AT 469, 470, 60 A. AT 1052 THAT DECLARATIONS OF THE DECEDENT INCONSISTENT WITH THE VALIDITY OF THE WILL ARE ADMISSIBLE: "THE DECLARATION OF THE DEFENSE IS THAT THE PAPER OF DECEMBER 20 CAME INTO EXISTENCE THROUGH FRAUD AND FORGERY AND HENCE THE LARGER LATITUDE IN THE PROOF WAS PERMISSIBLE."

FURTHERMORE, THE COURT STATED:

> THE TESTIMONY TOOK A WIDE RANGE, BUT NECESSARILY SO SINCE THE ALLEGATION WAS THAT OF FRAUD, AND IN THE ISSUES TRIED THE DECEDENT'S ACTS AND DECLARATIONS, AND THE CONDUCT OF THE INTERESTED PERSONS AROUND HIM WERE LEGITIMATE SUBJECTS OF INQUIRY.

THE ORPHANS' COURT ERRONEOUSLY EXCLUDED THE CONVERSATIONS BETWEEN THE DECEDENT AND HIS WIFE WHICH TOOK PLACE

LESS THAN ONE (1) MONTH BEFORE DEATH. ALSO ERRONEOUSLY EXCLUDED WERE POST EXECUTION STATEMENTS OF THE DECEDENT'S DAUGHTER, ELIZABETH COWDEN, WHO WAS A BENEFICIARY, CHIEF PROPONENT, CO-EXECUTRIX AND CO-TRUSTEE UNDER THE QUESTIONED DOCUMENT. THE PETITIONERS CONTEND THAT ELIZABETH CIAFFONI COWDEN PARTICIPATED IN THE PREPARATION OF THE WILL. ADMITTEDLY SHE WAS PRESENT AT ITS SIGNING AND BECAME THE SOLE POSSESSOR OF THE WILL UNTIL IT WAS LODGED FOR PROBATE. SHE MADE STATE-MENTS THAT SHE WAS DEVISED OTHER REAL ESTATE THAN THAT CONTAINED IN THE PROVISIONS OF THE WILL AS PROBATED. THESE STATEMENTS WERE AT VARIANCE WITH THE PROVISIONS IN THE WILL IF THE DOCUMENT, AS PROBATED, HAD IN FACT CONTAINED THOSE PROVISIONS WHEN SIGNED ON MAY 10, 1968. THIS EVIDENCE,

IF ADMITTED, WOULD HAVE GONE DIRECTLY TO THE ISSUE OF PETITIONERS' ALLEGATIONS THAT PAGES OF THE QUESTIONED DOCUMENT WERE, AFTER EXECUTION, FRAUDULENTLY SUBSTITUTED.

WHEREFORE, THE PER CURIAM OPINION OF THE PENNSYLVANIA SUPREME COURT BEING CLEARLY ERRONEOUS AND DENYING TO THE PETITIONERS THEIR RIGHTS TO DUE PROCESS UNDER THE LAW, A WRI. OF CERTIORARI SHOULD ISSUE TO THE PENNSYLVANIA SUPREME COURT TO CORRECT THIS MANIFEST INJUSTICE.

RESPECTFULLY SUBMITTED,
THEODORE E. BREAULT
ATTORNEY FOR PETITIONERS

APPENDIX PAGE

1. Per curiam Opinion of the Supreme Court of the Commonwealth of Pennsylvania, filed on April 30, 1980.....A2

2. Dissenting Opinion of Justice Samuel J. Roberts, Supreme Court of the Commonwealth of Pennsylvania, filed April 30, 1980.....A3-9

3. Opinion and Decree of Orphans' Court Division of Court of Common Pleas of Washington County, Pennsylvania, Keim, J.....A9-34

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(112)

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: ESTATE OF PAUL CIAFFONI, DECEASED

No. 121 March Term 1979

Appeal from the Decree of the Orphans' Court Division of the Court of Common Pleas of Washington County, at No. 63-74-942

APPEAL OF: CONCETTA CIAFFONI, DECEDENT'S WIDOW, ROBERT J. CIAFFONI, DECEDENT'S SON and MARGARET CIAFFONI SOVIERO, DECEDENT'S DAUGHTER

Entered: September 11, 1979

OPINION

PER CURIAM: FILED: APR 30 1980

Decree affirmed. Each party to pay own costs.

Mr. Justice Flaherty took no part in the consideration or decision of this case.

Mr. Justice Roberts filed a dissenting opinion.

(J. 112)

IN THE SUPREME COURT OF PENNSYLVANIA
Western District

ESTATE OF PAUL CIAFFONI, Deceased

No. 121 March Term 1979

Appeal from Order of the Orphans' Court Division of the Court of Common Pleas of Washington County, Pennsylvania, at No. 63-74-942

APPEAL OF CONCETTA CIAFFONI, Decedent's widow, ROBERT J. CIAFFONI, Decedent's son, and MARGARET CIAFFONI SOVIERO, Decedent's daughter

DISSENTING OPINION

ROBERTS, J. FILED: APR 30 1980

This is an appeal from the probate of the will of decedent Paul Ciaffoni. Presented is the question whether evidence of fraud profferred by appellants was improperly ruled inadmissible by the orphans' court. The majority of this Court finds no error in this evidentiary ruling and summarily affirms. I dissent.

Paul Ciaffoni, a resident of Washington County, died on September 23, 1974. Dece-

dent's widow Concetta Ciaffoni, seven children and twenty-three grandchildren survived him. Appellants Concetta Ciaffoni and two children, Robert J. Ciaffoni and Margaret Ciaffoni Soviero, challenged probate of a document dated May 10, 1968. They alleged that certain pages of the seven page document had been fraudulently substituted following execution. At the probate hearing, appellants sought to establish their allegation of fraud by introducing approximately forty previously probated wills, drafted by the same scrivener and typed in the scrivener's office, to show discrepancies between these comparison wills and the document offered for probate. The orphans' court excluded this evidence, withdrew the case from the advisory jury and entered a decree in favor of the validity of the challenged document. Appellants took this appeal from the decree. (J.112-2)

The orphans' court excluded the forty prev-

iously probated comparison wills because, in its view, testimony of the scrivener made it "obvious that any differences in typing or word use that the jury may have found among all those wills simply have no probative value in the Ciaffoni case." It is not disputed, however, that the scrivener drafted the probated comparison wills. Furthermore, the proponents of the will offered the testimony of the scrivener and his secretary that they prepared the challenged document now offered for probate.

This record and the previous decisions of this Court satisfy me that the orphans' court's exclusion of the probated comparison wills was erroneous. In deciding the question of admissibility, the court must consider whether the evidence sought to be admitted has probative value and is material to the issues in the case. I Wigmore on Evidence, §10 (3d ed.1940). Appellants offered the probated comparison wills as evidence of the

scrivener's established practice in drafting testamentary documents. As this Court has stated, "(o)f the probative value of a person's habit or custom, as showing the doing on a specific occasion of the act which is the subject of the habit or custom, there can be no doubt." Baldridge v. Matthews, 378 Pa. 566, 570, 106 A.2d 809, 811 (1954)(quoting, I Wigmore on Evidence, §92 (3d ed. 1940). Accord, McCormick on Evidence, §195 2d ed. 1972). In this case, appellants' introduction of a large number of probated comparison wills would permit the fact-finder an opportunity to compare the allegedly substituted pages of the document offered for probate with this scrivener's previously probated wills. Surely this evidence is probative on the material issue of fraudulent substitution of pages presented in this case. See also Moore, Testimony of the Expert Document Examiner, 22 U. Pitt. L. Rev. 675 (1961). Thus, the orphans' court's improper exclusion

of this evidence denied appellants their right to establish the issue of fraudulent substitution of pages, and precluded the factfinder from exercising its function of examining (J.112-3)
these probated comparison wills and determining the genuineness of the allegedly substituted pages.

The orphans' court's exclusion of this evidence is contrary to the rulings of this Court in Lare Will, 352 Pa. 323, 42 A.2d 801 (1945) and Kane's Estate, 312 Pa. 531, 168 A. 681 (1933). In Lare Will, this Court similarly compared typewriting samples in deciding that a substantial factual dispute had been raised by this evidence and that the orphans' court improperly "assumed the province of (the) jury" in deciding the issue. Such evidence was considered sufficiently probative to require consideration by the fact-finder. Likewise in Kane's Estate, this Court approved use of typewriting samples for comparison with a

challenged document. It is clear from this Court's decision in Kane's Estate that the comparison evidence was considered probative and material as we held that evidence sufficient to support the Chancellor's findings. See also 42 Pa.C.S. §6111 (expert testimony permitted to make comparison of documents).

Until today's order, this Court's rule in cases involving fraud has always permitted the widest possible latitude in the admission of evidence. Young Estate, 347 Pa. 457, 32 A.2d 901 (1943); Lappe v. Gfeller, 211 Pa. 462, 60 A. 1049 (1905). Because the probated comparison wills appellants sought to introduce have probative value with respect to appellants' allegation of fraud under these decisions it is clear that the orphans' court erred in excluding this evidence. Additionally, appellants attempted to establish fraud by introducing expert testimony regarding the misalignment of indentations on the backer of the document offered for probate, statements

of the decedent regarding the provisions of the document, and statements of a beneficiary regarding that individual's understanding of the testamentary dispositions. In light of my views on the issue of excluding evidence of probated comparison wills, I do not address the merits of these issues.

Accordingly, I would vacate the decree and remand for a new probate hearing.

IN THE COURT OF COMMON PLEAS OF WASHINGTON COURTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

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| IN RE: | ) | |
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| ESTATE OF PAUL CIAFFONI, | ) | No. 63 74 942 |
| | : | |
| Deceased | ) | |
| | : | |
| | ) | |

OPINION AND DECREE

BY THE COURT,

(OPINION BY KEIM, J.)

This matter is presently before the Court upon exceptions filed on behalf of contestants excepting to various evidentiary rulings

as well as the Order of Court withdrawing the case from the Jury, dismissing the appeals from probate, and finding in favor of the probated document.

## I. HISTORY OF THE CASE

Paul Ciaffoni died on September 23, 1974, a resident of Washington County, Pennsylvania, survived by his widow, Concetta Ciaffoni, by seven children and twenty-three grandchildren.

On December 16, 1974, the Register of Wills of Washington County admitted to probate a document dated May 10, 1968, which was offered for Probate by Elizabeth Cowden. Letters testamentary were granted to Elizabeth Ciaffoni Cowden and Concetta Ciaffoni. Robert Ciaffoni disqualified himself from being a co-executor. December 11, 1975, decedent's daughter, Margaret Ciaffoni Soviero, filed her appeal from probate. On December 9, 1976, decedent's widow Concetta Ciaffoni, and defendent's son, Robert Ciaffoni, filed their separate appeals from probate. By Order en-

tered January 31, 1977, Judge Paul A. Simmons, then presiding over the Orphans' Court Division of Washington County ordered the appeals filed by Concetta Ciaffoni and Robert Ciaffoni consolidated with the appeal of Margaret Ciaffoni Soviero.

On August 1, 1978, an amended appeal from Probate of Decedent's will was filed on behalf of Concetta Ciaffoni and Robert J. Ciaffoni.

On October 18, 1977, Judge Simmons disqualified himself from presiding at the hearing of this will contest, subsequently the Supreme Court of Pennsylvania appointed this Court to specially preside over the will appeal.

An advisory jury was impaneled to hear the appeal and trial began September 18, 1978, continuing until September 25, 1978. Proponents produced the attorney-scrivener, the Honorable Richard DiSalle, now a Judge of the Commonwealth Court of Pennsylvania. Judge

DiSalle identified all the pages of decedent's will presently on file as written by him according to directions and descriptions of the testator, Paul Ciaffoni. Judge DiSalle testified that decedent's Will consisted of a series of revisions made by Paul Ciaffoni to a prior Will of his dated 1967 and also written by Judge DiSalle. The 1967 Will itself was based upon Paul Ciaffoni's prior 1965 Will written, not by Judge DiSalle, but by an attorney named Patrick Derrico. Judge DiSalle further testified that in January of 1968, Paul Ciaffoni came to Judge DiSalle's office to make changes in the 1967 Will. Judge DiSalle produced two yellow note sheets and a copy of the 1967 Will containing more notes of decedent's instructions on the disposition of his property. Judge DiSalle then related how decedent changed dispositions of his property among his various family members. Judge DiSalle's then secretary, Frances

Gray, typed the new Will and made two copies which remained in the Judge's law office.

Judge DiSalle further testified that on May 10, 1968, he went to an accountants' meeting at decedent's office. After that meeting, decedent decided to sign his Will, so Judge DiSalle instructed his secretary to bring the Will to decedent's office. The changes were read to decedent. Judge DiSalle then assembled the other subscribing witnesses, after which the testator signed his Will.

Proponents called the two other subscribing witnesses, Patricia McFarlane and Frances Gray. Mrs. Gray testified that she brought decedent's Will to his office in response to a telephone call from Judge DiSalle. She stated the decedent signed the Will in her presence with the other two subscribing witnessess attending. Mrs. McFarlane then an employee at decedent's office, also testified to decedent's execution of the Will in the presence of herself, Judge DiSalle and Fran-

ces Gray. Each subscribing witness is disinterested, receiving nothing under decedent's Will.

Contestants offered no evidence to challenge the validity of decedent's signature. Contestants offered testimony of alleged experts propounding unproven and concededly "novel" theories, which was ruled inadmissible. Results offered by contestants from a machine developed within several months of trial were similarly excluded. Contestants' offer of decedent's declarations on the issue of forgery was also rejected because contestants could offer no independent admissible evidence of forgery.

Contestants then elected to rest their case.

Since no issue of fact was then in contest, the Court withdrew the case from the advisory jury, dismissed the appeals from probate, and entered an Order in favor of the validity of the probated Will of Paul Ciaffoni.

At that time, this Court directed that argu-

ment on contestants' exceptions proceed before a Court en Banc consisting of this Court sitting alone. Exceptions were filed by contestants on December 29, 1978. The Court then set February 21, 1979 for oral arguments on its exceptions. Briefs were subsequently submitted and the Court has reviewed those briefs and considered oral arguments made.

## II. DISCUSSION

1. In their first exception, contestants object to the exclusion of over fifty wills they calim were prepared by Judge DiSalle and typed by Frances Gray. The contestants claim that the admission of these other wills was for the purpose of comparing traits and authorship between the will at issue and these other fifty wills.

First, contestants made no showing that each of those wills was typed by Mrs. Gray. The testimony showed that Mrs. Gray had no regular schedule for taking vacations and that she was replaced by substitutes when she went on vaca-

tion or was ill. It would be impossible for the Jury to reach meaningful conclusions as to Mrs. Gray's typing style on the basis of samples that may not even have been typed by Mrs. Gray.

Secondly, that a jury could readily observe and make comparisons among all of these wills as contestants claim is highly doubtful. Contestants point to no clearly distinguishable habits of either Judge DiSalle or Mrs. Gray as standards for comparison. The comparison documents, themselves, are not written by using characteristic and identifiable expressions of speech, but rather are written in formal legal style using legal terms of art. Further, the testimony showed that Mrs. Gray actually altered her typing habits for longer documents. The Ciaffoni Will is seven pages long as compared with the wills offered by contestants which are typically two or three pages long. Similarly, Judge DiSalle testified that there was no set style, form or

practice established for typing in his office; to the contrary, he offered to produce papers from his office showing discrepancies in typing style.

In light of that testimony, it is obvious that any differences in typing or word use that the jury may have found among all those wills simply have no probative value in the Ciaffoni case. Since the testimony show that differences in typing and word use should be expected, no logical inferences are possible from the discovery of any differences among the wills offered for examination. In particular, no inference as to the identity of the scrivener or the typist of decedent's will could properly have been drawn.

Further, the confusion and delay which would result from such evidence is itself grounds to exclude that evidence. In their examination of all those wills, the jurors' attention would have been distracted from the primary issue of the trial which was the validity of

one will, decedent's will, to myriad collateral issues concerning over fifty wills. Certainly, the author and typist of each of those more than fifty wills would have had to be established before the wills could have been used by the jury as a basis of comparison. Thus, the jury would have had to make a finding on those issues for each of the more than fifty wills before making its findings as to the authorship and the identity of the typist of decedent's Will.

Contestants' claim that the Court's ruling was contrary to law overlooks fundamental distinctions between their only cited case, Kane's estate, 312 Pa. 531 (1933), and the Ciaffoni case. In Kane, supra, an actual courtroom demonstration by the alleged typist showed his typical way of accommodating to a deficiency in a particular typewriter. It was this directly observed characteristic, reinforced through other documents, that the Court used as a basis to compare the typing on the

questioned document. No such directly observable characteristics were available in the Ciaffoni case, rather, the jury would have seen only a mass of documents with no standard to use for its comparisons.

In addition, it should be noted that the will in question was apparently styled after a prior will drafted for decedent by another attorney. Therefore, the Court believes the other wills offered by contestants could not be compared to the will in question and would be without probative value.

2. The second question raised by contestants in their brief deals with Exceptions two, three and four, which basically deals with the Court's refusal to admit testimony of experts as to the typing and linguistic style in the questioned will compared with all other DiSalle-Gray probated wills.

Exception 2 summarizes the offer by contestants to produce testimony by Jon A. Shank, a professor of business typing, as to his expert

analysis of 39 typing elements in the questioned document of May 10, 1968 (and in the alleged prior document of November 29, 1967) with the other DiSalle-Gray wills, dated both prior to and subsequent to May 10, 1968, which evidence the Court refused.

Exception 3 summarizes contestants' offer to produce testimony by Andrew Q. Morton, an expert whose testimony has been ruled admissible in criminal cases in England. Andrew Q. Morton examined all other DiSalle-Gray wills, both prior to and subsequent to May 10, 1968 and compared the use of language in those documents with both the May 10, 1968 questioned document and the November 29, 1967 document and concluded that "the habits in the disputed will of May 10, 1968 and the draft will of November 29, 1967 are so different that these cannot be regarded as a product of the DiSalle-Gray combination." The Court refused to admit such testimony.

Exception 4 sets forth contestants' offer

to produce the testimony of Robert Parslow, a professor of linguistics, who compared the same documents and analyzed the consistency or lack of consistency in the use of capital letters in legatees' names, the manner in which real estate is described, and in the use of such phrases as "in fee simple", "give, devise and bequeath", "known as" and the words used in the mineral reserve clause. Again, the Court refused such evidence.

Contestants offer Jon A. Shank for his analysis of thirty-nine typing elements. Contestants, however, do not state whether each of the comparison wills as well as decedent's Will contain all of those elements. Certainly, a typing element that occurs once in one comparison will but occurs somewhat differently in decedent's will proves absolutely nothing. Further, contestants never discuss in their offer of proof whether their list of thirty-nine elements is in fact a complete list of all elements necessary to properly

identify a typist.

Robert Parslow is offered for his analysis of the occurrence of seven phrases in the comparison wills and in decedent's Will. As with Shank, whether anaylsis of only those seven phrases suffices to infer authorship is missing from contestants' offer of proof. Further, it is doubtful that Parslow, and, for that matter, each of the other experts, compared decedent's Will with every other known will prepared by Judge DiSalle and typed by Frances Gray, as contestants claim, since, in their offer of proof as to each expert, contestants cite the number of comparison wills as forty-seven, (forty-one predating decedent's Will, six postdating that Will), while fifty-six wills are listed by contestants in their offer of proof of the wills. Andrew Q. Morton's testimony was offered for his comparison of the "use of language" in the comparison wills and decedent's will and for his conclusions as to differences in "habits" he

claims to have found. Utterly no attempt was made by contestants in their offer of proof to specify which uses of language were examined by Morton, which so-called "habits" were discovered, or even how Morton determined a "habit" from a "non-habit".

Contestants' statement that no attack was made upon the qualifications of the witnesses is misleading in its implications. The issue of the qualifications of these "experts" was never reached because the evidence was excluded on other grounds.

Contestants offer two arguments for the admissibility of their evidence; first, that there is statutory authority for the admission of that evidence, and, secondly, that four cases cited by them shows that "similar" evidence had been admitted before in other will contests. However, neither of those arguments can withstand scrutiny.

The statutes cited by contestants do not support the admission of contestants' evi-

dence because those statutes merely change the prior law that experts were not competent to compare disputed with admittedly genuine handwriting. Foster v. Collner, 107 Pa. 305 (1884). See Travis v. Brown, 43 Pa. 9 (1892); in re Rocky's Estate, 155 Pa. 453 (1893). However, those statutes do not affect the other requirements of admissibility of scientific evidence which contestants' evidence violate such as the necessity to show the reliability of the scientific principles used by experts and to show the reliability of the techniques an expert has employed.

In short, the problems with the proposed "expert" testimony offered by contestants goes directly to the reliability of the techniques used by contestants' experts in forming their conclusion in the instant case. Contestants' inability to supply the Court with information sufficient to make a judgment as to the validity and reliability of techniques employed by their "experts' as well as to make a judgment

as to the reliability of the scientific principles used, compels exclusion of the testimony by each of contestants' "experts".

The third question raised by contestants in their brief, deals with Exception No. 5.

In Exception No. 5, contestants argue that the Court improperly excluded the testimony of Robert Freeman and the results of tests on the ESDA machine and the testimony of Paul Osborn concerning indentations found on the backer of decedent's Will.

Although this Court was favorably impressed with the ESDA machine test, it is clear that the results of the ESDA machine's operations are at present inadmissible.

The work product of the ESDA machine is inadmissible because the ESDA cannot meet the standard of general acceptance in the scientific community required by the Supreme Court of Pennsylvania in Commonwealth v. Topa, 471 Pa. 223 (1977).

Furthermore and of more significance to this

Court, both the testimony of Mr. Freeman and Mr. Osborn is inadmissible for the reason that both men agree that the evidence produced by the ESDA machine could have been interpreted in either of two ways.

At an in camera hearing held September 20, 1978, contestants' expert, Paul Osborn, testified as follows in response to questioning by counsel for contestants:

"Q. Mr. Osborn, with respect to the misalignment, both horizontal and vertical, of all the writing on page seven, with the identations of the writing on page seven, one with another, have you any explanation as to how much misalignment could occur?

A. Yes.

Q. Is there more than one explanation for such misalignment?

A. Yes.

Q. Could you tell us whatever number of explanations occur to you, explaining each one of those possibilities to us?

A. Yes.

Q. Would you please?

A. One, it occurs to me from examining the

original will in its present state, bound with three grommets at the top, that pages seven and the backing are of such a nature that page seven and the backing can be moved in various directions very simply, despite the fact that they are bound, and that five different writings, including the date and four signatures, could quite possibly have caused a variance in the indentations on the backing when they were written on page seven, despite the fact that page seven and the backing were grometted together in their position. The other explanation is that these variances in the identations on the backing as compared to the signatures could have been due to the fact that the pages were not bound together with the backing in its present condition. In any event, the variations in the backing as compared to the signatures are each unlike the other variations, as each lineup is made. And as a result of that, I find no real evidence indicating what the situation was when those signatures were made.

Q. You could not choose between those two possible alternatives?

A. No."

In light of Paul Osborn's testimony, the Court's exclusion of that evidence is not contrary to Kane's Estate; 312 Pa. 531 (1933), Lare Will, 352 Pa. 323 (1945); or Cutler Estate (No. 2), 33 D & C 2d 682 (1964), cited

by contestants at pages 20 and 21 of their brief. Contestants cite those cases as authority for the admission of evidence of misalignments in the instant case. However, those cases are simply inapplicable to the Ciaffoni case because the issue in the instant case is the relevance of those misalignments found on Freeman's ESDA machine to proving any fact in the case at bar, not the general admissibility of such evidence.

The fourth question raised in contestants' brief corresponds with Exception No. 6, which deals with exclusion of declarations of the decedent offered on the issue of forgery. Contestants argue that they should have been permitted to offer evidence of statements by the testator that he never signed any document containing provisions which exist in the question probated document. The rule to which contestants refer, and which the Court applied, is stated in the case of Swope v. Donnelly, 190 Pa. 417 (1899), and Herster v.

Herster, 122 Pa. 239 (1889) as follows:

> ".... proof of declarations (of the decedent) was not in itself sufficient either to establish the execution of the will, or to overcome the testimony of the subscribing witnesses, and that it was admissible only for the purpose of corroboration." Swope v. Donnelly, 180 Pa. 417, 418.

In short, those cases cited by contestants in their brief are inapposite and therefore provide no support for contestants' argument. Furthermore, this Court believes that there is no support for contestants' theory that the proponents waived the Swope rule, or that proponents case in chief is a mass of contradictions and inconsistencies as is argued by contestants in their brief.

The fifth question raised by contestants in their brief corresponds with Exception No. 7 which contends that it was error by the Court to refuse evidence that a proponent and chief beneficiary of the questioned document made declarations contrary to the document and to surrounding circumstances as of May 10, 1968.

It should be noted at the outset that Patricia McFarlane's answer to a question asked by counsel for contestants makes consideration of contestants' exception number seven of merely academic interest. When asked by counsel for contestants whether she had discussions with Elizabeth Cowden concerning what Mrs. Cowden expected to receive under decedent's will, Mrs. McFarlane said , "No". Thus, contestants can hardly complain that it was the Court's ruling that precluded them from introducing evidence of Mrs. Cowden's statements at that point in the trial. Further, contestants are incorrect when they claim that the Court 'precluded' them from introducing evidence of statements of that beneficiary since the Court specifically stated it would permit that evidence at a later point in the trial after a foundation for its relevance had been laid.

Evidence of what a beneficiary under Decedent's Will thinks she may or may not be re-

ceiving has utterly no relevance to the issues in the Ciaffoni case, and was properly excluded. That a beneficiary may be told, perhaps falsely, by a decedent tc expect to inherit certain property is no evidence that decedent's Will is a forgery. Further, the use of statements of interested parties in Lappe v. Gfeller, 211 Pa. 462 (1905) cited by contestants as authority for the introduction of Mrs. Cowden's statements, is of no help to them for two reasons. First, as contestants note in their brief at page 34, in Lappe, supra, it was after proponents' case in chief that contestants were permitted to introduce statements of interested parties to show forgery. However, in the Ciaffoni case, contestants sought to introduce statements of an interested party at the very outset of proponents' case and before any ground had been laid for its relevance. Secondly, Lappe, supra, permitted the use of statements and facts of interested parties in clearly limited

circumstances not found in the Ciaffoni case. At 211 Pa. 470, the Supreme Court said:

> "The paper itself, having been destroyed by Mrs. Morgenroth, was not produced at the trial and hence there was no opportunity to attack by direct testimony the genuineness of the decedent's signature. It therefore became necessary for those denying the legality of the paper, and in fact the only proof against its validity they could produce was, to show the circumstances, acts and declarations of the interested parties bearing on its validity and genuineness." (Emphasis added)

Contestants sixth and final issue raised in their brief, which corresponds with Exception No. 8, complains that the Court erroneously precluded the contestants from introducing evidence that in the same year, the questioned document was allegedly executed (May 10, 1968), the attorney-scrivener of the questioned document permitted or caused to be filed in the Office of the Clerk of the Orphans' Court of Washington County, a document he knew bore a forged notarization, which document was dated July 17, 1968.

At trial, however, contestants offered the

document in order to "give some light on things that were going on in that office that Mrs. Gray knew nothing about." However, that Mrs. Gray knew or didn't know things happening in the office where she worked bears absolutely no relevance to the issues in the Ciaffoni case. Mrs. Gray testified to decedent's execution of his will, which she attended, and to her typing of decedent's Will. That Mrs. Gray may have been ignorant of other matters in her office does not effect her testimony in the slightest. Further, Mrs. Gray's ignorance of other matters in her office has not the slightest significance in proving or disproving whether pages in decedent's Will were substituted. Therefore, the Court properly sustained proponents' objection and excluded this evidence.

Consistent with the foregoing discussion, it is the opinion of this Court that contestants' exceptions to the Court's Order Dismissing the Appeals and upholding the valid-

ity of the probated document is denied.

IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA

ORPHANS' COURT DIVISION

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| IN RE: | ) | |
| | : | |
| ESTATE OF PAUL CIAFFONI | ) | |
| | : | No. 63 74 942 |
| Deceased. | ) | |
| | : | |
| | ) | |

O R D E R

AND NOW, to wit, this 27th day of August, 1979, upon due and careful consideration of the Arguments and Briefs filed herein by both proponents and contestants, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Exceptions filed herein are hereby denied.

BY THE COURT,

/S/ Earl S. Keim P.J.

ATTEST:

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Clerk

No. 80-775

Supreme Court, U. S.
FILED
DEC 8 1980
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1980

CONCETTA CIAFFONI, ET AL., *Petitioners*

*v.*

ELIZABETH COWDEN, ET AL., *Respondents*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA**

## RESPONDENTS' BRIEF IN OPPOSITION

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No. 80-775

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IN THE
SUPREME COURT OF THE UNITED STATES

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October Term, 1980

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CONCETTA CIAFFONI, ET AL., *Petitioners*

*v.*

ELIZABETH COWDEN, ET AL., *Respondents*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA**

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**RESPONDENTS' BRIEF IN OPPOSITION**

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## RESPONDENTS' COUNTER-STATEMENT OF THE CASE

This matter involves a challenge to the validity of the Last Will and Testament of Paul Ciaffoni, who died on September 23, 1974, residing in Washington County, Pennsylvania. The decedent's Will was admitted to probate by the Washington County Register of Wills on November 25, 1974. Appeals from the decision to admit the Will to probate were filed by two of the decedent's seven children and by his widow. The appeals alleged that the Will was a forgery in that pages had been substituted after the Will had been signed.

At the trial of the will contest, the contestants offered to introduce, *inter alia*, three items of evidence in support of their forgery claim. First, they offered the testimony of an alleged expert in linguistic styles. This witness would have testified that he had compared the decedent's Will to approximately fifty other wills believed to have been written by the lawyer who wrote the decedent's Will. He also would have testified that there were differences in the language used, including the use or non-use of certain words and phrases, to cause him to believe that the decedent's Will had been written by someone other than the lawyer who claimed to have written it.

The proffered testimony was refused because it could not be established that linguistic analysis techniques had any validity whatever when the technique consisted of identifying particular words or phrases, such as the use of "I give, bequeath and devise", compared to "I give", in a will. Furthermore, whatever the validity of linguistic analysis might be in identifying the author of a creative work, such as a novel, there was no evidence that it had ever been used in identifying the author of a legal document. Such documents are based upon the requirements of the law, legal form books and prior versions of the same document[1] as well as upon the draftsman's intellect and imagination.

The second item of evidence offered by the contestants, and refused by the trial court, was testimony of an alleged expert in typing characteristics. He claimed to have compared thirty-nine "typing elements" in the decedent's Will with those elements in approximately fifty other wills supposedly written by the same lawyer and typed by the same secretary. "Typing elements" are

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1. The decedent's Will had been prepared by revising an earlier will, which was itself a revision of a still earlier will which had been drafted by a different lawyer having no association with the lawyer who wrote the probated will.

items which allegedly characterize the style of a particular typist. They include, for example, width of margins, spacing and paragraphing, the presence or absence of underscoring where blank spaces (such as date) are to be filled in, and the presence or absence of a typed name below a signature line.

This proffered testimony was also refused. First, it could not be established that the same typist had typed all of the fifty or so comparison wills. Second, there was no evidence that there was any scientific support for the technique in general, or for the thirty-nine "typing elements" selected by the proposed witness as his standards for comparison.

The third item of proffered evidence was the result of a test performed on the decedent's Will by the inventor of an "electrostatic detection apparatus" ("ESDA"). This machine was alleged to be capable of measuring and revealing very slight indentations in paper surfaces, such as those which occur on sheets of paper placed beneath a sheet on which writing is being done. The proposed witness would have testified that the indentations on the backer to the decedent's Will did not correspond precisely to the handwritten date and the signatures of the decedent and the witnesses on the last page of the will. The reason for the discrepancy was that the last page of the will had moved slightly compared to the backer as the various handwritten items were being placed on it. There was, however, no evidence to suggest why the paper had moved. The contestants contended that the will had not been stapled or bound together when it was executed (thereby making the alleged subsequent substitution of pages possible), but it was equally likely that the page had shifted slightly as the signers' hands rested on it.

The trial court rejected this proffered testimony because the ESDA had never achieved scientific acceptance in the United States, and even if it had done so, no

conclusions relevant to the issues could be drawn from the test results.

The contestants also attempted to introduce evidence of oral statements of the testator and one of his daughters, which statements allegedly contradicted the provisions in the Will. These offers were refused in accordance with the applicable Pennsylvania rules of evidence.

The trial court upheld the validity of the decedent's Will, and the contestants appealed to the Pennsylvania Supreme Court. The issue before the Supreme Court was the correctness of the various evidentiary rulings described above. The Supreme Court affirmed the trial court *per curiam*, with one Justice dissenting and one not participating. A subsequent application for reargument in the Supreme Court was denied.

## REASONS WHY THE WRIT SHOULD BE DENIED

The pending Petition seeks to obtain this Court's review of a state court decision pertaining only to the admissibility of evidence under state decisional law. No federal question whatever, much less a substantial one, can be found in this case, nor was any federal question presented to the Pennsylvania Supreme Court. Accordingly, there is no jurisdiction under 28 U.S.C. §1257 (3) for this Court to grant certiorari.

A grant of certiorari is permissible only when two conditions exist. First, the case must present a substantial federal question. *E.g., Durley v. Mayo*, 351 U.S. 277, 76 S.Ct. 806, 100 L.Ed. 1178 (1956), *rehearing denied*, 352 U.S. 859, 77 S.Ct. 22, 1 L.Ed. 2d 69; *Southwestern Bell Telephone Co. v. State of Oklahoma*, 303 U.S. 206, 58 S.Ct. 528, 82 L.Ed. 751 (1938). Second, the federal question must have been properly raised and considered in the state court proceedings. *E.g., Louisville etc. N. R. Co. v. Woodford*, 234 U.S. 46, 34 S.Ct. 739, 58 L.Ed. 1202 (1914); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 23 S.Ct. 375, 47 L.Ed. 480 (1903). This court has consistently held that it cannot and will not decide federal constitutional questions which are first presented when a review of the state court decision is being sought. *E.g., Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed. 2d 398 (1969); *Edelman v. People of State of California*, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387 (1953). Neither condition has been fulfilled in this case.

The Questions Presented for Review, as set forth in the Petition for Certiorari, assert that the refusal of the trial court to admit certain testimony into evidence constitutes a denial of due process of law under the Fifth and Fourteenth Amendments to the United States Constitution. After making the assertion, however, the Petitioners fail to offer either argument or authority for the proposition that the trial court's purely evidentiary rulings violated any constitutional rights. The entire ar-

gument of the Petitioners is that there have been erroneous evidentiary rulings in the trial court. On this basis alone, it is clear that the jurisdictional requirement of a substantial federal question has not been met, and for this reason the Petition should be denied.

Even if this Court believes that a substantial federal question is contained in the Petition, or can be fairly inferred from the questions presented therein, that federal question was never presented either to the trial court or the Pennsylvania Supreme Court. The Petitioners have not cited any point in the trial or appellate record where the existence of a federal question was presented or suggested. They cannot do so because no such point exists. No reference to or asserted reliance upon any federal law or constitutional provision was ever made during the trial or appeal of this case. The questions presented to the Pennsylvania Supreme Court are solely evidentiary questions. Indeed, even the dissenting opinion by Mr. Justice Roberts in the Pennsylvania Supreme Court (reproduced at A3 of the Petition for Writ of Certiorari) deals only with the admissibility of the proffered but rejected testimony. The opinion does not mention in even the most tangential manner the existence of any federal question in this case. It is clear that if any federal question exists in this case, it has not been presented to the state courts as uniformly required by the decisions of this Court.

Since neither of the two prerequisites for the issuance of a Writ of Certiorari by this Court are present in this case, the Petition must be denied.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 1980, three copies of Respondents' Brief in Opposition were mailed by First Class Mail to Theodore E. Breault, Esq., 1000 Lawyers Building, Pittsburgh, PA 15219. I further certify that all parties required to be served have been served.



Mark E. Goldberg